INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	9
Conclusion	13

CITATIONS

Cases:

American Construction Co. v. *Jacksonville, Tampa and Key West Ry. Co.*, 148 U.S. 372	9
Beneficial Finance Co. of Wisconsin v. *Wirtz*, 346 F. 2d 340	10
Brennan v. *General Motors Acceptance Corporation*, 482 F. 2d 825	12–13
Brennan v. *Heard*, 491 F. 2d 1	12
Chambers Construction Company v. *Mitchell*, 233 F. 2d 717	10
Cobbledick v. *United States*, 309 U.S. 323	9
Coleman v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, certiorari denied, 409 U.S. 948	8, 12, 13
Decaturville Sportswear Co. v. *National Labor Relations Board*, 406 F. 2d 886	10
Federal Trade Commission v. *Broch & Co.*, 368 U.S. 360	14
Firemen v. *Bangor & A.R. Co.*, 389 U.S. 327	9
Goldberg v. *Cockrell*, 303 F. 2d 811	12
Hodgson v. *American Can Company*, 440 F. 2d 916	10

Cases—Continued

	Page
Hodgson v. *Corning Glass Works*, 474 F. 2d 226, affirmed June 3, 1974, No. 73–29	10, 11
Hodgson v. *First Federal Savings and Loan Assn. of Broward County, Fla.*, 455 F. 2d 818	7
Jones v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245	13
J. P. Stevens & Co. v. *National Labor Relations Board*, 380 F. 2d 292, certiorari denied, 389 U.S. 1005	10
Labor Board v. *Express Pub. Co.*, 312 U.S. 426	
Laffey v. *Northwest Airlines, Inc.*, 366 F. Supp. 763	13
Local 189, United Papermak. & Paperworkers v. *United States*, 416 F. 2d 980, certiorari denied, 397 U.S. 919	13
McComb v. *Jacksonville Paper Co.*, 336 U.S. 187	9, 12
Mitchell v. *DeMario Jewelry, Inc.*, 361 U.S. 288	12
Mitchell v. *Pidcock*, 299 F. 2d 281	12
National Labor Relations Board v. *Express Publishing Co.*, 312 U.S. 426	11
National Labor Relations Board v. *Great Atlantic & Pacific Tea Company*, 408 F. 2d 374	10
Robinson v. *Lorillard Corp.*, 444 F.2d 791, certiorari dismissed, 404 U.S. 1006	13
Sprogis v. *United Air Lines, Inc.*, 444 F. 2d 1194, certiorari denied, 404 U.S. 991	13
Tobin v. *Frost-Arnett Co.*, 13 WH Cases 566, 34 Labor Cases, ¶ 71,220, affirmed *per curiam*, 264 F.2d 246	10
United States v. *Crescent Amusement Co.*, 323 U.S. 173	9
Wirtz v. *Ocala Gas Company*, 336 F.2d 236	10

Statutes:

	Page
Fair Labor Standards Act of 1938, 52 Stat. 1060, 12 amended, 29 U.S.C. 201 *et seq.*	2
29 U.S.C. 206(d)(1)	3
29 U.S.C. 255	2, 12

Miscellaneous:

111 Cong. Rec. 10794	13

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1348

J. M. FIELDS, INC., PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–18a) and its opinion on rehearing (Pet. App. 19a–20a) are reported at 488 F. 2d 443. The opinion of the district court (Pet. App. 26a–36a) is reported at 335 F. Supp. 731.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1973 (Pet. App. 1a–2a). On January 17, 1974, the court entered an order modifying its opinion (Pet. App. 19a–20a), pursuant to a timely petition for rehearing.[1] The petition for a writ of

[1] A copy of the Secretary's petition for rehearing is being lodged with the Clerk, along with a copy of the Appendix below, referred to here as "A."

certiorari was filed on March 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in light of the evidence of petitioner's centralized control over the wage practices of its chain of department stores, including the three stores found to be in violation of the Equal Pay Act, the district court properly issued a chain-wide injunction.

2. Whether petitioner, having full knowledge of the Equal Pay Act, acted "willfully" for purposes of the 3-year statute of limitations (29 U.S.C. 255) when it continued to pay lower wage rates to women area supervisors than to men area supervisors performing equal work.[2]

STATUTE INVOLVED

The pertinent equal pay provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set forth in the petition (Pet. 4–5).

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[2] The question whether "hardline" and "softline" managers' jobs are equal for the purposes of the Equal Pay Act (Fields' Question 4; see *infra*, pp. 3–4) is not ripe for review in view of the remand of that question to the district court for further findings (Pet. App. 12a–13a; see *infra*, pp. 8–9). This remand does not mean, as Fields implies (Fields' Question 4; Pet. 4, 10, 19–20), that the Secretary failed to carry his burden of proving violations in the first instance. On the contrary, resolution of the "hardline v. softline" issue in the Secretary's favor would simply mean that the violations are even more extensive than the trial court found them to be.

Fields' Question 2, whether the injunction should have been limited to the category of employees (Area Supervisor) as to which violations had been proven, was not raised until the Secretary moved for rehearing (see *infra*, p. 7).

STATEMENT

This action was brought by the Secretary of Labor in the United States District Court for the Middle District of Florida to enjoin J. M. Fields, Inc. ("Fields") from violating the equal pay provisions of the Fair Labor Standards Act, known as the Equal Pay Act of 1963 (29 U.S.C. 206(d)(1)).

Petitioner Fields owns, operates and controls a chain of more than 60 discount department stores in 11 States on the eastern seaboard (A. 9, 11, 738).[3] Fields' headquarters are in New York City, but, through its nine district managers and three regional directors, it maintains close control over the day-to-day operations of each store (A. 353, 596, 739). The Secretary's action was commenced after an investigation of three of Fields' Florida stores (located at Tallahassee, Eau Gallie and Merritt Island) under the direction of two different district managers revealed identical apparent violations of the Equal Pay Act (A. 590, 598, 739).

The Secretary alleged that Fields paid its women department managers, called "Area Supervisors," less than it paid their male counterparts for doing equal work. This discrimination arose in part from Fields' published practice of paying lower wages to managers of softlines of merchandise (clothing), who were generally women, than it paid to managers for hardlines (all lines other than clothing), who were generally men (Pet. App. 6a–7a; A. 504–505, 782). The Secretary alleged that work of softline and hardline man-

[3] "A." refers to the parties' Appendix in the court of appeals.

agers was equal for the purposes of the Equal Pay Act, and that, in any event, within each of these job categories, female managers were paid less than male managers for equal work (Pet. App. 6a–7a).

While the district court rejected the Secretary's argument that softline and hardline managers did equal work (Pet. App. 28a–29a, 31a), it nonetheless found numerous instances of sexual discrimination within both of these categories. Thus the court found that since February 1966 male hardline managers in the Tallahassee store have been paid an average ranging between $.35 and $.45 cents per hour more than female hardline managers in that store (Pet. App. 29a).[4] The court also found an average $.35 per hour pay difference between male and female softline managers in that store for the period from September 1966 to February 1969 (*ibid.*).[5]

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[4] The difference was such that some female hardline managers in that store were paid less than male softline managers. Thus, for example, Peggy Smith, who worked at the Tallahassee store as a manager for curtains and domestics (a hardline department), was paid less than either David Hawthorne or John Costoldi, who both worked in softline departments (Pltf's Exh. 3), although only Mrs. Smith used the "pre-print" method of ordering (A. 138–140, 143–147), which, according to Fields, required greater skill and responsibility (Pet. App. 28a–29a). (Fields claimed in a posttrial motion and on appeal that "curtains and domestics" was not a "hardline" department (Pet. App. 9a). This contention, which was contrary to the testimony of Fields' Director of Industrial Relations and two of its store managers (A. 472, 717, 721, 721a, 815), was not adopted by the court below.)

[5] Thus, for example, Elaine Hanna (manager of infants' and children's wear at the Tallahassee store) was paid five cent per hour less than David Hawthorne (manager of men's and boy's wear), although she had more experience and greater

In Eau Gallie, the court found, Fields paid male hardline managers an average of $.27 per hour more than female hardline managers between June 1965 and May 1969 (Pet. App. 30a).[c] The court found two violations in the Merritt Island store. Shirley Giannini, the manager for the hardline departments of curtains and domestics, received an average of $.20 per hour less than the male hardline supervisors in that store. Mrs. Giannini received $.23 per hour less than Steve Shytle, the housewares manager, even though Mrs. Giannini had more seniority and had been rated as an "outstanding department manager in all respects," whereas Mr. Shytle was on probation for repeated poor work performance (Pltf's Exh. 5; A. 454). Also the court found that between June 1965 and November 1966 Mildred Sutherland was paid, for managing the hardline department of health and beauty aides at the Merritt Island store, an average of $.40 per hour less than the store's male hardline supervisors.

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seniority and had received a letter from the store manager thanking her for her outstanding work and complimenting her as one of the top ten department managers in the company, whereas Mr. Hawthorne was only an "average" employee (A. 126–127, 110–111, 179; Pltf's Exh. 3).

[c] Thus Lorraine Lunden, the female supervisor for small appliances and cameras at the Eau Gallie store, was paid 17 cents per hour less than the male supervisor for sporting goods (George Bayne), although Mrs. Lunden had more experience and greater seniority and had been awarded the prize for having managed the department with the greatest sales increase in the entire chain (A. 229–230; Pltf's Exh. 4). Similarly, Olga Sims, who replaced Richard Varney as supervisor of the men's department at the Eau Gallie store, was paid 63 cents per hour less than Varney, although both had been hired with almost no experience (Pltf's Exh. 4).

The evidence also established a centralized control by Fields of the chain's outlets. While Fields correctly states (Pet. 6) that the policy of the company was to make the individual store managers responsible for recruiting and hiring, it was undisputed that the *initial* hiring at each new store was handled by either the regional personnel director or by a representative from the New York office (A. 354, 419, 528, 552).[7] The initial hiring rates would establish the pay pattern for the store. The authority of the store managers to set subsequent wage rates was further limited by "directions from our central office as to the amount of budget to be used for payroll" (Pet. App. 39a) and by other "guidelines," including "a [wage] survey" that made them aware of "what the scale was for the entire area" (Pet. App. 43a). Nor could the store managers raise the rates of any of their employees without first "institut[ing] a request for an increase in pay and forward[ing] it to the district manager" (Pet. 44a; see also A. 261, 357, 393, 414–416, 562, 599–600, 606, 779, 786–787, 827). Indeed, the New York office conducted an audit of the wage structure of each store following the enactment of the equal pay bill, after which it advised the store managers that it had reviewed their "current situation" for possible equal pay violations and had found that their companies were "in full compliance of the new law" (A. 867; see also A. 349–350, 360–361, 406, 409).

[7] As a result of this policy, the manager of the Eau Gallie store could point to only three area supervisors personally hired by him (A. 552).

The district court concluded that "J. M. Fields, during the periods in question, hired and paid its employees at whatever rate it could get them, the overall result of which was to discriminate against women" (Pet. App. 31a). Pursuant to this finding and the evidence of centralized control the court issued a chain-wide injunction against further violation of the Equal Pay Act.

2. On Fields' appeal, the court below affirmed the trial court's issuance of a chain-wide injunction, noting that the "[e]vidence introduced at trial indicated that Fields' hiring and wage policies were subject to centralized control of a significant degree" (Pet. App. 17a). As the court explained, "[i]t would frustrate the broad purposes of the FLSA in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations in all or substantially all of the defendant's branches to justify the issuance of a chain-wide injunction" (*ibid.*), particularly where, as here, the violations resulted from a company policy of hiring and paying employees at whatever rates the market will bear.[8]

[8] In the last paragraph of its original opinion, the court expressed the view that the injunction should be limited to the one category of employees involved in violations, *i.e.*, the "area supervisors," but this paragraph was subsequently withdrawn pursuant to the Secretary's petition for rehearing (Pet. 19a). As the Fifth Circuit stated in another case, "we find no legal justification in compartmentalizing an employer corporation in order to warrant an injunction against illegal employment practices to be applied only as to the particular job category in which the violation occurred" (*Hodgson* v. *First Federal Savings and Loan Assn. of Broward County, Fla.*, 455 F. 2d 818, 826).

On the Secretary's cross-appeal, which questioned the correctness of the trial court's holding that the violations were not "willful" within the meaning of the Portal-to-Portal Act's 3-year statute of limitations, as well as its holding that the hardline and softline supervisor jobs were unequal, the case was reversed and remanded for further proceedings. On the "willfulness" issue, the court of appeals noted that the trial judge did not have the benefit of its decision in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139 (C.A. 5), certiorari denied, 409 U.S. 948, when he held that the violations were "the unintended result of Fields' practice of hiring persons at whatever wage it could" (Pet. App. 13a). Then, after reviewing the evidence which established that Fields was fully aware of the Act's equal pay provisions, the court of appeals concluded that the violations were "willful" in the civil sense, and that they could not be excused, as Fields argued, on the ground that they constituted a "random" pattern of discrimination. "To allow exceptions for 'random' discrimination," said the court, "would sap much of the [Equal Pay Act's] vitality * * * [and] create unnecessary problems for future courts attempting to construe the Act" (Pet. App. 14a–15a).

On the issue of the equality of the softline and hardline jobs, the court concluded that the jobs were "substantially equal", noting that in both job categories the managers "were responsible for ordering merchandise, for assisting customers with their purchases, and for maintaining orderly and properly displayed racks of merchandise in their respective departments" (Pet. App. 10a–11a). The court of appeals reversed the district court's finding that the hardline jobs

required greater "skill" (Pet. App. 11a) and remanded the case for the district court to "explain its reasons for finding distinctions between hardline and softline in terms * * * [of effort and responsibility]" (Pet. App. 13a).

ARGUMENT

The two issues currently presented for review were correctly decided by the court below. The third question, whether hardline and softline jobs are equal, is not ripe for review in view of the remand of this issue for further findings. Certiorari at this stage of the proceedings would therefore result in piecemeal review. Such review is especially inappropriate since the resolution of the two issues presented here would not aid the trial court in deciding the remaining issues. *Firemen* v. *Bangor & A. R. Co.*, 389 U.S. 327; *Cobbledick* v. *United States*, 309 U.S. 323, 325; *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry. Co.*, 148 U.S. 372, 384–386, 387.

1. The injunction challenged here is identical in scope to almost every other injunction issued under the Fair Labor Standards Act. It is directed against the employing company, without any geographic or unit limitation, and enjoins violations of the specific provisions of the Act shown to have been violated. Although there may be situations where such a company-wide decree would not be warranted, it is settled that the decree "should operate as an effective deterrent to a repetition of the unlawful conduct" (*United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186; *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192–

193). Under this standard, the courts have routinely issued company-wide decrees, based on violations at only one establishment, where the defendant operates a chain store or other multi-unit operation (see, *e.g.*, *Wirtz* v. *Ocala Gas Company*, 336 F.2d 236, 240-241 (C.A. 5); *Tobin* v. *Frost-Arnett Co.*, 13 WH Cases 566, 34 Labor Cases, ¶ 71,220 (W.D. Tenn.), affirmed *per curiam*, 264 F.2d 246 (C.A. 6); *Chambers Construction Company* v. *Mitchell*, 233 F.2d 717, 725 (C.A. 8)). Such injunctions are particularly appropriate where, as here, the violations are the result of a company policy (*Beneficial Finance Co. of Wisconsin* v. *Wirtz*, 346 F.2d 340, 344 (C.A. 7)). Similar decrees have also been issued by the National Labor Relations Board. See, *e.g.*, *J. P. Stevens & Co.* v. *National Labor Relations Board*, 380 F.2d 292 (C.A. 2), certiorari denied, 389 U.S. 1005; *National Labor Relations Board* v. *Great Atlantic & Pacific Tea Company*, 408 F.2d 374 (C.A. 5); *Decaturville Sportswear Co.* v. *National Labor Relations Board*, 406 F.2d 886 (C.A. 6).

The two cases cited by Fields (Pet. 12–15), *Hodgson* v. *Corning Glass Works*, 474 F. 2d 226 (C.A. 2), affirmed, No. 73–29 (decided June 3, 1974), and *Hodgson* v. *American Can Company*, 440 F. 2d 916 (C.A. 8), do not hold otherwise. In those cases, which do not involve chain stores, the violations occurred at specific manufacturing plants and were not shown to have been the result of any company-wide policy. Indeed, in *Corning* the court of appeals emphasized that the violations "were largely a result of the [local]

New York law" (474 F. 2d at 236). Moreover, the court noted that in the "only other cases where a similar violation might exist * * * [in states other than New York] the Secretary had * * * already instituted [separate] suit[s]" (474 F. 2d at 236).[9]

Here, identical violations were established at each of three stores, even though the stores were located in two of Fields' nine districts and thus were under the jurisdiction of two different district managers (A. 739). The evidence also established that the initial hiring was handled by either the regional or home office (A. 354, 419, 528, 552) and that subsequent hiring rates were established in accordance with Fields' published salary ranges (A. 393–394, 416–417) and its policy of giving considerable weight to the applicant's past salary or to the rate at which the applicant would work (A. 462, 528, 549, 561, 784–785, 807)—a policy which, as the court below recognized, resulted in the equal pay violations.

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[9] The other cases cited by petitioner (Pet. 12) are equally inapposite. Thus, unlike the decree reviewed by this Court in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, which attempted to restrain violations wholly unrelated to any that had been charged and found by the Board (312 U.S. at 432–433), the decree here is limited to violations "which are of the same type or class as [the] unlawful acts which the court has found to have been committed" (312 U.S. at 435). And in *Federal Trade Commission* v. *Broch & Co.*, 368 U.S. 360, the Court, after emphasizing the Commission's "wide discretion to formulate a [decree]," upheld its authority to enjoin certain conduct prohibited by the Clayton Act not only in transactions involving the seller and buyer with respect to whom a violation had been established, but also in transactions involving *any* seller and buyer (368 U.S. at 363–364).

Contrary to Fields' assertion (Pet. 18), the issuance of a chain-wide injunction does not create a presumption of wrongdoing at Fields' other establishments. In any subsequent proceeding against Fields, the Secretary must still prove that violations have occurred, and the burden of this issue is the same as it was in the original action. Fields, moreover, will "still be able to raise questions of law and of good faith as freely as in the original suit for an injunction" (*Mitchell* v. *Pidcock*, 299 F. 2d 281, 287 (C.A. 5)). It is true that Fields, if found in contempt, will be required to pay the cost of the investigation and subsequent legal proceeding. This requirement, however, does not represent a punishment but, like the restitution of unpaid wages, is "compensatory only" (*Mitchell* v. *DeMario Jewelry*, 361 U.S. 288, 293; *McComb* v. *Jacksonville Paper Company, supra*, 336 U.S. at 193) and is designed to "shif[t] the responsibility for compliance onto the employer's shoulders" (*Goldberg* v. *Cockrell*, 303 F. 2d 811, 814 (C.A. 5)).

2. The holding below that violations are "willful" for purposes of the 3-year statute of limitations applicable to civil suits (29 U.S.C. 255, as amended by the Fair Labor Standards Amendments of 1966, 80 Stat. 830, 844) if "the employer kn[e]w [that] the FLSA was in the picture" and had to be considered (Pet. App. 14a), not only accords with the numerous decisions construing this term (*Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, 1142 (C.A. 5), certiorari denied, 409 U.S. 948; *Brennan* v. *Heard*, 491 F. 2d 1, 3 (C.A. 5); *Brennan* v. *General Motors Acceptance*

Corporation, 482 F. 2d 825 (C.A. 5); *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C.)) or its equivalent in other civil legislation (*Local 189, United Papermak. & Paperworkers* v. *United States*, 416 F. 2d 980, 996 (C.A. 5), certiorari denied, 397 U.S. 919; *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 796–797 (C.A. 4), certiorari dismissed, 404 U.S. 1006; *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 250 (C.A. 10); *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1201 (C.A. 7), certiorari denied, 404 U.S. 991), but, we submit, is also required by the "liberalizing intention * * * of Congress" (*Jiffy June Farms, supra*, 458 F. 2d at 1142) in enacting the 1966 Amendments (see, *e.g.*, 111 Cong. Rec. 10794). The 3-year statute is part of the Act's civil sanctions, which are compensatory in nature and which should not be interpreted to permit Fields to shift the burden of its "poor judgment" (Pet. 23) to its women employees.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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